IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

Shivlal Vs. Smt. Jhamku Bai & Ors.
S.B. CIVIL FIRST APPEAL NO.217/2002

Against judgment and decree dated 26.09.2002 passed by Addl. District Judge No.1, Udaipur in Civil Original Suit No. 190/1997 – Smt. Jhamku Bai Vs. Smt. Sajjan Bai & Ors.

DATE OF JUDGMENT: 21st April,2006.

PRESENT

HON'BLE MR.JUSTICE SATYA PRAKASH PATHAK

Mr. P.C. Purohit for appellant.
Mr. C.P. Soni for respondent No.1.

BY THE COURT:

Challenge has been made to the judgment and decree dated 26.09.2002 passed by learned Addl. District Judge No.1, Udaipur in Civil Original Suit No. 190/1997 (Smt. Jhamku Bai Vs. Smt. Sajjan Bai & Ors.), whereby the plaintiff-respondent No.1's suit has been decreed.

On filing this appeal, this Court before admission issued notices to the

respondent No.1 to 12 and called for the record. The record in this case was received on 19.02.2003, however, it appears that inspite of several opportunities being given in the case, notices were not filed in compliance of the order of this Court. Time was again given to the appellant to make compliance of the order and after repeated opportunities to the appellant when compliance was not made; this Court passed order on 21.04.2004 to the following effect:

> "Nobody appears for the appellant and requisites have also not been put in as reported by the Registry. As such, against the unserved respondent, the appeal is dismissed for non-prosecution."

By the aforesaid order, the appeal against respondent No.2 to 12 has been dismissed. It appears that both the learned counsel requested for the final disposal of the appeal and this Court passed order on 12.05.2004 to the effect that the appeal be listed for final disposal in the month of July 2004. It also appears that thereafter the matter was adjourned for one reason or the other and now the matter is on

board for final disposal of the appeal, which except respondent No.1 against all other respondents has already been dismissed.

Briefly stated, the facts giving rise to the present case are that plaintiff respondent Jhamku Bai - widow of Late Shri Dalchand, filed a declaratory suit in the trial Court in the year 1996 to declare the unregistered Adoption Deed dated 18.10.1987 in favour of defendant No.4 to be ineffective and void and to partition the suit property. It is stated in the plaint that Shri Dalchand expired in the year 1982 and his another wife Radha Devi alias Raji Bai expired issueless on 14th of September 1996. It is stated further that Sajjan Bai & Smt. Keshi Bai, who are defendant No.1 & 2 respectively in the suit, are the daughters of plaintiff, and Heeralal the defendant No.3 is the husband of defendant No.1 Sajjan Bai. Defendant No.4 Shivlal (appellant herein) is the son of Keshi Bai, who is defendant No.2 in the suit. It is also stated that Late Shri Dalchand during his lifetime under an unregistered Deed dated 21.12.1960

gave agricultural land to the plaintiff for her maintenance measuring 1 bigha 19 biswas situated in village Kanod, then in Khasra No.1101 and 1102, and after death of Shri Dalchand, the husband of plaintiff, she became absolute owner of the property mentioned in Para No.4 of the plaint. The description of the properties of Late Dalchand is stated in Para No.6 of the plaint. It is also stated that when plaintiff sold some of the agricultural land to defendant No.3 as stated in appendix under a registered sale deed on 11.02.1994 then defendant No.4, who is her maternal grand-son, filed a revenue suit in the Court of SDO in the year 1994 on the basis of Adoption Deed to restrain her from disposing of the property of the deceased only then it came to the knowledge of the plaintiff for the first time the fact of alleged unregistered Adoption Deed said to be made by her Late husband in favour of the respondent, as such it became essential for her to file the present suit by giving the details of the property for declaring her rights and granting relief to the plaintiff. Plaintiff made the statement in the plaint that the

adoption deed is a fabricated piece of document, which was prepared for filing the revenue suit and that being a suspicious document is of no effect against the plaintiff. It was prayed that the plaintiff be declared absolute owner of the suit land, description of which has been made in Para 4 of the plaint i.e. 1 bigha 19 biswas of agricultural land situated in village Kanod. It was also prayed that it be declared that defendant No.4 is not the adopted son of Late Shri Dalchand and the Adoption Deed dated 18.10.1981 is illegal, void and has no binding effect against the plaintiff. It was further prayed that the suit property be divided between the plaintiff and defendant No.1 to 3 as stated in the plaint.

Defendant No.2 and 4 i.e. Smt. Keshi Bai, who is daughter of plaintiff, and Shivlal, the son of Keshi Bai and maternal Grandson of Jhamku Bai filed joint written statement and after denying the factum of plaintiff being legally wedded wife of Late Shri Dalchand, and averred that Late Shri Dalchand executed an unregistered sale-deed in favour of Shivlal in

presence of villagers after following the prevailing customs in the community, therefore defendant No.4 was entitled to claim the entire property on the basis of unregistered Adoption Deed. They also denied the plaintiff's right in relation to the agricultural land situated at village Kanod. It was stated that the real wedded wife of Late Shri Dalchand was Smt. Radhi Bai alias Raji Bai and she died issueless and the defendant No.4 being the adopted son is having all the rights in the property and the plaintiff being not legally wedded wife is not entitled to claim any right in the suit property, therefore the suit was liable to be dismissed. Defendant No.1 admitted the contents of the plaint and prayed that the suit be decreed. Defendant No.3 also admitted the contents of the plaint and prayed that the suit be decreed. The State of Rajasthan was also made a party through Tehsildar but the other respondents have not filed any written statement.

The trial Court, on the basis of pleadings of the parties, framed as many as 14

issues including the issue of relief. In support of its case, plaintiff examined herself as PW1 and also PW2 Partha and PW3 Bansilal of Kanod. Defendants produced as many as 9 witnesses including DW1 Shivlal, DW2 Mohanlal, DW3 Banshilal of Udaipur, DW4 Tulsiram, DW5 Shantilal, DW6 Chatarsingh, DW7 Chhogalal, DW8 Vishnukumar and DW9 Jhamaklal. Both the parties tendered some documents in evidence. The learned trial Court, after hearing both sides, decreed the suit of the plaintiff declaring the Adoption Deed as illegal and void having no binding effect against the plaintiff vide order dated 26.09.2002. It has further declared that defendant No.4 is not the adopted son of Late Dalchand and a preliminary decree has been passed. Hence, the present appeal has been filed, which has already been dismissed against respondent No.2 to 12 and survives only against respondent No.1 Jhamku Bai, the plaintiff.

Heard learned counsel for both sides and perused the material available on record.

In the present case, the following points require consideration:

1. Whether the plaintiff has no right in the suit land and the property of Late Shri Dalchand as she was not the legally wedded wife?
2. Whether Late Shri Dalchand adopted defendant No.4 as his son and an unregistered Adoption Deed was executed which was legally valid?
3. Whether on account of alleged Adoption Deed dated 08.10.1981 the defendant became entitled for the suit property and the plaintiff's suit was not liable to be decreed?
4. Whether trial Court's judgment and decree requires interference by this Court?

Point No.1:

It is to be seen that the controversy which has been raised by defendants No.2 & 4 in the written statement is to the effect that plaintiff is not the legally wedded wife of

Late Dalchand, therefore, she has no right in the suit property. To examine this aspect of the matter, when statement of DW1 Shivlal, who is defendant No.4 in the suit is seen then it appears that factum of marriage has not been denied. Even in the statements of plaintiff and the witnesses produced on her behalf namely Sarva Shri Partha & Banshilal clearly make a mention that Dalchand had two wives; one of them was plaintiff and the name of other wife was Raji Bai. It has also come in their statements that the other wife died issueless. Even in the evidence produced on behalf of the defendants, the factum of marriage has not been denied. It is also significant to mention here that the plaintiff in her lifetime before 1954 filed a petition for maintenance in the Magistrate's Court and maintenance was allowed to her. Ex.6 & Ex.1 are two documents respectively of the years 1960 and 1966, which clearly indicate that plaintiff's husband was Dalchand. Ex.1 is the order passed in a revenue suit filed by the plaintiff against her husband for permanent injunction in relation to the land in dispute, mention of which has been

made in Para 4 of the plaint and these two documents clearly indicate that the plaintiff was wife of Late Shri Dalchand.

In view of above two documents and there being no material available on record to show that either the marriage was not legally permissible or the marriage had not taken place at all, it is not safe to presume that plaintiff is not the legally wedded wife, and therefore, the contention of the appellant that plaintiff is not legally wedded wife of Late Shri Dalchand cannot be accepted. The appellant, who is defendant No4 in the suit and is also the maternal grandson of the plaintiff, though has stated in the written statement that plaintiff had come in Nata to Shri Dalchand as no issue was born to the first wife but the evidence part, when looked into, then what clearly comes out is that the witnesses of both side have clearly established the fact that plaintiff cannot be ousted on the plea of the defendants that she is not the legally wedded wife of Late Shri Dalchand and is not entitled to file the suit.

The Hindu Marriage Act came into force in the year 1955. The documents Ex.6 and Ex.1 when seen together go to show that the marriage took place prior to 1955. If that is so, then in my considered opinion the contentions raised by the learned counsel for the appellant deserve rejection and the same are hereby rejected. Thus, answer to Point No.1 is that the plaintiff is the legally wedded wife of Late Shri Dalchand and has right to maintain claim in the suit property of late Shri Dalchand.

Point No.2 & 3:

Since both the points relate to each other, they are being disposed of together.

After coming to the conclusion that the plaintiff respondent was legally wedded wife of Late Shri Dalchand and she is entitled to file the suit, now the important aspect which requires consideration is as to whether the defendant respondent, who is claiming the entire suit property on the basis of

unregistered adoption deed, can claim the right over the disputed property, mention of which has been made in the plaint?

Contentions have been raised on behalf of the appellant to the effect that since adoption of defendant-appellant took place in presence of villagers according to customary rites prevailing in the society and as Dalchand died issue-less, the appellant is having all the rights over the property and the plaintiff's suit was not maintainable as she was not legally wedded wife. It has also been the contention that the suit filed after an inordinate delay was liable to be dismissed on the point of limitation. The learned counsel further contended that giving and taking ceremony in respect of adoption was conducted and consent of the plaintiff as well as the legally wedded wife Smt. Raji Bai was obtained, therefore, the trial Court committed error of law as well as of facts while decreeing the suit in favour of plaintiff.

The contentions of the respondent plaintiff are to the effect that plaintiff being the legally wedded wife and her husband Dalchand having expired long back, she became the absolute owner of the property of Late Shri Dalchand as there was no issue borne from their wedlock. As regards limitation, it has been the contention that the trial Court has considered the matter and has also recorded the finding in relation to the alleged deed that it creates no rights to the defendant. According to the learned counsel, the conclusions were drawn by the trial Court on the basis of provisions contained in the Hindu Adoptions and Maintenance Act, 1956 (hereinafter to be referred as 'Adoption Act'). It has also been the contention that in the year 1994 when defendant filed a revenue suit before the SDM, she came to know about the alleged adoption deed made in the year 1987 and soon thereafter in the year 1996 the suit was filed.

Before proceeding further, it shall be necessary to see the relevant provisions of the Adoption Act, which require that for a valid

adoption there should be consent of the wife/wives. Sec. 5 states that adoption is required to be made under the provisions of the Act of 1955 and for a valid adoption the requirements mentioned in Sec.6 are that (1)the person adopting has the capacity, and also the right, to take in adoption; (ii) the person giving in adoption has the capacity to do so; (iii) the person adopted is capable of being taken in adoption; and (iv) the adoption is made in compliance with the other conditions mentioned in this Chapter. Sec.7 of the Adoption is most relevant for determining the present case, which reads as under:

> 7. Capacity of a male Hindu to take in adoption.- Any male Hindu who is of sound mind and is not a minor has the capacity to take a son or a daughter in adoption:
>
> Provided that, if he has a wife living, he shall not adopt except with the consent of his wife unless the wife has completely and finally renounced the world or has ceased to be a Hindu or has been declared by a court of competent jurisdiction to be of unsound mind.
>
> Explanation.- <u>If a person has more than one wife living at the time of adoption, the consent of all the wives is necessary</u>

> unless the consent of any one of them is unnecessary for any of the reasons specified in the preceding proviso."
>
> (Emphasis supplied)

Further, Sec.8 prescribes the eligibilities of a Hindu female to be taken in adoption while Sec.9 tells about the persons capable for giving child in adoption and Section 10 makes mention about the persons to be adopted. Sec.15 states that valid adoption is not liable to be cancelled. Sec.11, which enumerates other conditions for a valid adoption is reproduced hereunder:

> "11. Other conditions for a valid adoption.- In every adoption, the following conditions must be complied with:
>
> (i)if any adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
>
> (ii)if the adoption is of a daughter the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
>
> (iii)if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the

person to be adopted;

(iv)if the adoption is by a female and the person adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;

(v)the same child may not be adopted simultaneously by two or more persons;

(vi)the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth (or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up) to the family of its adoption:

Provided that the performance of datta homan, shall not be essential to the validity of an adoption."

In the present case, the plaintiff has alleged that the unregistered adoption deed infact is a fake document made by the present appellant in relation to consent though the arguments which have been raised in the present matter on behalf of the defendant are to the effect that consent of the plaintiff was obtained.

The evidence of plaintiff and her cross-examination clearly establish the fact

that no consent of the plaintiff was ever obtained. The photographs, which have been filed during the course of trial on behalf of defendant, shows only the photos of defendant and other persons including another wife of Late Dalchand namely Smt. Raji Bai but no photo of the plaintiff is available and the alleged adoption deed which has been filed, is admittedly an unregistered one, though makes a mention of the fact that plaintiff signed the adoption deed (Ex.1A) on the date when adoption took place in presence of witnesses but a perusal of the document nowhere shows either the thumb impression or the signatures of the plaintiff on this document. Thus, on the basis of this documentary evidence it cannot be presumed that plaintiff was present when alleged adoption took place and this adoption deed was reduced into writing though Chatar Singh Modi (DW6) examined on behalf of defendant has proved the adoption deed Ex.1 and has stated that he is well versed with the handwriting and signatures of his father who was a practicing Advocate and according to him he had drawn the adoption deed. In the cross

examination, questions were put to this witness in relation to use of different inks and in relation to signatures made by different persons. Certain portions of adoption deed were shown to the witness for his comments as they were written in different pen/inks and the writing is different. Be that as it may, the reliability of this document Ex.1 becomes doubtful for the simple reason that it states that it was signed by the plaintiff in presence of witnesses whereas there appears no signatures of the plaintiff. On careful examination of the plaintiff's evidence and the statements of defendant and other witnesses, it cannot be presumed that the plaintiff was present there.

Another aspect of the matter is that when a document has been produced in the court then that document has to be examined taking into consideration the averments made in the document. It is very important to note that the document states that it was signed by a particular person and the witnesses also say that it was signed by the plaintiff but if

there is no signatures of the plaintiff then the document tendered in evidence is bound to create doubt about its genuineness. The plaintiff in her statement has clearly stated that she had filed a suit for maintenance against her husband and she was granted maintenance. Her marriage took place with Dalchand, however, no issue was borne from their wedlock and according to her she was living separately. She has stated that her relations were not cordial with the other wife of Dalchand. It appears from perusal of the evidence led by both sides that though the defendant has stated that consent of the plaintiff was obtained before adoption but that fact is not established in view of documents submitted by the defendant i.e. the photographs and the adoption deed. In the photographs there is no photo of the plaintiff and in the document i.e. the alleged Adoption Deed, there appears no signatures of the plaintiff. Plaintiff in her statement has clearly stated that she was not aware of the adoption ceremony and there must not be her consent at all. Be as it may, the fact of the matter which is

decisive of the matter is as to whether any consent was obtained from her and for that the evidence adduced by the defendant is not sufficient to establish that there was consent of the plaintiff at all at the time of alleged adoption of defendant appellant. If that is so, then in view of the provisions contained in the Adoption Act such adoption cannot be considered to be a legal and valid adoption. The learned trial Court while considering the evidence has discussed the matter in detail and has reached to the conclusion that in fact the alleged adoption deed is not a valid document but is void one. The findings arrived at by the learned trial Court appears to be based on proper appreciation of evidence. The question regarding filing of the suit beyond the prescribed period for filing the suit and limitation was considered by the trial Court and it was found that on coming to know about the adoption deed, she filed the suit in the year 1996. The plaintiff's case in the plaint has been that when a revenue suit was filed by the plaintiff before the SDO, it came to her knowledge that some false do cument was

prepared by the defendant so that she may not dispose of the property and therefore, the suit was filed. The defendant in his statement has admitted that the alleged unregistered adoption deed was kept by him and was never taken out. No steps were taken by the defendant on the basis of this document for getting the agricultural land mutated in his favour in the revenue records. Thus, it appears that this document if at all was there, was not within the knowledge of the plaintiff and the trial Court has correctly disposed of the issue in this regard.

I have examined the matter thoroughly and find that the mandatory requirement of law i.e. the consent of living wife is missing in this case and therefore the alleged document of adoption creates no right in favour of the defendant-appellant. It is further significant to mention here that this appeal has already been dismissed by this Court against all other respondents i.e. respondent No.2 to 12 as compliance of the orders of the Court was not made. Defendant No.3 Heeralal, is the husband

of one of the daughters of the plaintiff and the plaintiff has stated that she has disposed of some of her land to him. Heeralal who was one of the defendants in the suit, has supported the version of plaintiff.

After considering the evidence led in the case and after carefully examining the evidence recorded by the trial Court on the issues framed, it appears that the trial Court has reached to correct conclusions in the matter. In the absence of consent, in view of the provisions of Adoption Act, the alleged document of adoption deed creates no right in favour of defendant-appellant and it is ineffective and void against the plaintiff. Thus, the answer to Point No.2 & 3 is that the unregistered adoption deed is not a valid document and it creates no right in favour of the defendant-appellant in relation to the suit property and the suit was rightly decreed.

Point No.4:

In view of discussions made in relation to Point No.1 to 3 and the findings recorded

thereon, it appears that the trial Court has correctly passed the impugned judgment and decree, which requires no interference by this Court and the appeal filed by the defendant-appellant is liable to be dismissed.

For the reasons aforesaid, there being no merit in the present appeal filed by the appellant, the same is hereby dismissed and the judgment and decree dated 26.09.2002 passed by Addl. District Judge No.1, Udaipur in Civil Original Suit No. 190/1997 – Smt. Jhamku Bai Vs. Smt. Sajjan Bai & Ors. is affirmed.

No orders as to costs.

(SATYA PRAKASH PATHAK)J.

/jpa